TRANSCRIPT OF RECORD

B

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 395

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

SOLOMON NOVECK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 24, 1926

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court, Southern District of New York

Writ of error

Filed May 6, 1926

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the District Court of the United States, for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a decision arresting a judgment which is in the District Court before you, or some of you, between the United States of America and Solomon Noveck, a manifest error hath happened to the great damage of the said United States of America as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if decision be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 1st day of May, 1926, in the year of our Lord one thousand nine hundred and twenty-six, and of the independence of the United States the one hundred and fiftieth.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WM. BONDY,
United States District Judge.

2 [File endorsement omitted.]

3 In United States District Court

Indictment

Filed Nov. 5, 1923

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern

District of New York and inquiring for said district, upon their oath present:

That heretofore, to wit, on the 13th day of March, 1920, at the Southern District of New York and within the jurisdiction of this Court, Solomon Noveck, the defendent herein, did unlawfully, wilfully, corruptly, and knowingly and fraudulently commit the crime of perjury as defined by section 125 of the United States Criminal Code in that at the time and place aforesaid the defendant Solomon Noveck did, for the purpose of defrauding the United States, take an oath before one Ida C. Raskin, the said Ida C. Raskin being then and there a person and officer competent to and authorized by law to administer an oath, to wit, a noary public in and for the county of New York, New York, that a certain written declaration and certificate, to wit, a certain paper writing purporting to be an income tax return to the collector of internal revenue for the second district of New York for the year 1919 for S. Noveck & Co., Inc., a corporation organized under the laws of the State of New York, of which corporation the said Solomon Noveck was then and there the president and the owner of about 98% of the stock in said corporation, of the amount of income tax due and owing by the said S. Noveck & Co., Inc., to the United States for the year 1919 by him subscribed was true; in which said income-tax return the said Solomon Noveck did take the said oath in a case in which the law of the United States authorized an oath to be administered, that is to say, the said S. Noveck & Co., Inc., then and there was required by law of the United States to make a return duly sworn to and subscribed by Solomon Noveck as president of the said corporation, of the amount of
4 income tax due and owing from said S. Noveck & Co., Inc., to the United States on its income for the year 1919; and the said Solomon Noveck then and there did falsely, corruptly knowingly, unlawfully, wilfully, and contrary to such oath report, state, and subscribe (1) certain matters, namely that the amount of income tax due and owing by S. Noveck & Co., Inc., to the United States for the year 1919 was $1,484.84, (2) and that the total net income from the business of S. Noveck & Co., Inc., received by the said S. Noveck & Co., Inc., amounted to $16,251.66, and the matters so sworn to and subscribed by him, the said Solomon Noveck, were material matters and were matters which by law of the United States the said Solomon Noveck was required to truly state and return under oath to the collector of internal revenue for the second district of New York as heretofore described, and the said Solomon Noveck then and there did not believe the said matters so stated by him to be true and then and there well knew that they were false;

Whereas in truth and in fact, as the defendant Solomon Noveck then and there well knew, the amount of income tax due and owing by the said S. Noveck & Co., Inc., to the United States for the year 1919 was an amount greatly in excess of the sum of $1,484.85, to wit, approximately $45,664.91, and that the amount of the total net income from the said business received by the said S. Noveck

& Co., Inc., for the year 1919 was an amount greatly in excess of the amount of $16,251.66, to wit, approximately $124,127.13; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 125, U. S. C. C.)

5

Second count

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on the 15th day of March, 1921, at the Southern District of New York and within the jurisdiction of this court Solomon Noveck, the defendant herein, did unlawfully, willfully, corruptly, and knowingly commit the crime of perjury as defined by section 125 of the Criminal Code of the United States in that at the time and place aforesaid the defendant Solomon Noveck did take an oath before one Ida C. Raskin, the said Ida C. Raskin being then and there a person and officer competent to and authorized by law to administer an oath, to wit, a notary public in and for the county of New York, N. Y.; that a certain written declaration and certificate, to wit, a certain paper writing purporting to be an income tax return to the collector of internal revenue for the second district of New York for the year 1920 for S. Noveck & Co., Inc., a corporation organized under the laws of the State of New York and of which corporation the said Solomon Noveck was then and there the president and the owner of about 98 per cent of the stock in said corporation of the amount of income tax due and owing by the said S. Noveck & Co., Inc., to the United States for the year 1920 by him subscribed, was true; in which said income tax return the said Solomon Noveck did take the said oath in a case in which the law of the United States authorized an oath to be administered, that is to say that the said S. Noveck & Co., Inc., then and there was required by law of the United States to make a return duly sworn to and subscribed by Solomon Noveck as president of the said corporation, of the amount of income tax due and owing from said S. Noveck & Co., Inc., to the United States on its income for the year 1920; and the said

6 Solomon Noveck then and there did falsely, corruptly, knowingly, unlawfully, willfully, and contrary to such oath report, state, and subscribe (1) certain matters, mainly that the amount of income tax due and owing by said S. Noveck & Co., Inc., to the United States for the year 1920 was $844.92. (2) and that the total net income from the business of S. Noveck & Co., Inc., received by the said S. Noveck & Co., Inc., amounted to $10,449.21, and the matters so sworn to and subscribed by him, the said Solomon Noveck, were material matters and were matters which by law of the United States the said Solomon Noveck was required to truly state and return under oath to the collector of internal revenue for the second district of New York as heretofore described; and the said Solomon Noveck then and there did not believe the said matters

so stated by him to be true and then and there well knew that they were false;

Whereas in truth and in fact, as the defendant Solomon Noveck then and there well knew, the amount of income tax due and owing by the said S. Noveck & Co., Inc., was an amount greatly in excess of the sum of $844.92, to wit, approximately $7,635.99, and that the amount of the total net income from the said business received by the said S. Noveck & Co., Inc., for the year 1920 was an amount greatly in excess of the amount of $10,449.21, to wit, approximately $40,413.87; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 125 U. S. C. C.)

WILLIAM HAYWARD,
United States Attorney.

7 In United States District Court

UNITED STATES OF AMERICA

against

SOLOMON NOVECK, defendant

Order to show cause

Filed Apr. 16, 1926

Upon the annexed affidavit of Ben A. Matthews, verified April 14, 1926, and upon the second count of the indictment herein, it is hereby

Ordered that the United States of America show cause before me at Room No. 331, in the United States Courts and Post Office Building, in the Borough of Manhattan, city, county, State and southern district of New York, on April 15, 1926, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be entered herein vacating and setting aside the sentence herein imposed on March 22, 1926, and directing the United States marshal and the warden of the Westchester County Penitentiary to release the defendant from custody and why the plea of guilty heretofore interposed by the defendant should not be withdrawn and in lieu thereof a demurrer to the indictment be interposed or the demurrer and motion to quash heretofore interposed reconsidered and sustained and the indictment dismissed, and why the defendant should not have such other relief as the court may deem just.

Let service of a copy of this order on the United States
8 attorney on or before April 14, 1926, at o'clock p. m. be deemed sufficient.

Dated New York, April 14, 1926.

COLIN NEBLETT,
United States District Judge.

9 In United States District Court

[Title omitted.]

Affidavit of Ben A. Matthews

STATE OF NEW YORK,
County of New York, ss:

Ben A. Matthews, being duly sworn, deposes and says:

That he is the attorney for the defendant above named. That on March 18, 1926, the defendant pleaded guilty to the second count of the indictment herein and was on March 22, 1926, sentenced thereon to serve a term of four months in the Westchester County Penitentiary and to pay a fine of two thousand dollars ($2,000). The defendant was thereupon taken into custody and the said fine was paid to the clerk. Theretofore the defendant had duly moved to quash and had demurred to the indictment on the ground that it did not state facts sufficient to constitute an offence, and the said motion to quash was renewed shortly prior to the plea of guilty.

Thereafter, on April 12, 1926, the Circuit Court of Appeals for the Second Judicial Circuit handed down its opinion in the case of Charles J. Steinberg against the United States of America, wherein the court held that the income tax laws have so far as indictments for perjury on tax returns are concerned repealed section 125 of the Criminal Code under which the indictment herein was found, and the Circuit Court of Appeals proceeded to direct the dismissal
10 of the count of the indictment against Steinberg charging perjury in falsely swearing to an affidavit annexed to a tax return.

In view of the foregoing the demurrer and motions to quash the indictment herein should have been sustained.

Rule 5 of the general rules of this court provides in part: "For the purpose of taking any action which must be taken within the term of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree." The term at which sentence was imposed has not expired, and the court theretofore has power to recall and vacate its sentence.

Deponent therefore prays on behalf of the defendant that the sentence heretofore imposed be vacated, the plea of guilty withdrawn, the sufficiency of the indictment reconsidered, and the indictment dismissed, and that an order to show cause to bring this matter on for speedy hearing be issued in the accompanying form.

BEN A. MATTHEWS.

Sworn to before me, this 14th day of April, 1926.

HELEN WERNER,
Notary Public.

N. Y. Co. Clk's No. 175, Reg. No. 7023. Term expires March 30, 1927.

11 In United States District Court

[Title omitted.]

Motion in arrest of judgment

Filed Apr. 16, 1926

The defendant above named hereby moves the court to arrest the judgment herein and to dismiss the second count of the indictment on the following grounds:

1. The indictment does not state facts sufficient to constitute an offence against the United States.

2. Section 125 of the United States Criminal Code, under which said indictment is drawn and a violation of which it purports to charge, has been repealed by section 253 of the revenue act of 1918 and section 253 of the revenue act of 1921 so far as indictments for perjury in tax returns under said statutes are concerned.

3. The oath alleged in the indictment was not an oath authorized or required by law.

4. The matters as to which perjury is alleged in said indictment are immaterial.

5. The indictment fails fairly to apprise the defendant of the offence of which he is charged so as to enable him to make a defense or avail himself of the plea of autrefois acquit or autrefois convict.

Dated New York, April 15, 1926.

ROTHWELL, HARPER & MATTHEWS,
Attorneys for Defendant,
Office and Post Office Address,
2 Rector Street, Borough of Manhattan, City of New York.

12 In United States District Court

[Title omitted.]

Opinion

Filed Apr. 16, 1926

Count two of the indictment in this case is for perjury for wilfully and falsely swearing to tax return for the calendar year of 1920 of Solomon Noveck & Co., Inc., a corporation, by the defendant Solomon Noveck. The indictment is laid under section 125, U. S. C. C.

The tax return was executed, sworn to, and filed in March, 1921.

The defendant pleaded guilty under count two of the indictment and was sentenced by this court to imprisonment for four months and to the payment of a fine of $2,000.00, all under section 125, U. S. C. C.

There is now a motion before the court to vacate this sentence and to arrest judgment.

The Circuit Court of Appeals for the Second Circuit has recently decided in the case of Charles J. Steinberg against United States of America that section 253 of the revenue act of 1921, which was approved on November 22, 1921, repealed section 125, U. S. C. C., in so far as indictments for perjury in tax returns made under the revenue act of 1921 are concerned. Section 253 of the revenue act of 1918, under which act the return in the present case was made, sworn to, and filed, is the same as section 253 of the revenue act of 1921. Thus, we have the same situation in this case
13 as was presented in the Steinberg case, with the exception of the fact that the return here was that of a corporation and the defendant was the president thereof, who swore to the truth of the return, while in the Steinberg case the return in question was that of the defendant.

The Steinberg case is controlling. The fact that in that case the tax return was that of an individual and in this case was that of a corporation makes no difference in theory.

I hold that section 253 of the revenue act of 1918, in so far as indictments for perjury in tax returns under the revenue act of 1918 are concerned, repealed section 125, U. S. C. C.

COLIN NEBLETT, *U. S. D. J.*

13a In United States District Court

[Title omitted.]

Order vacating sentence

Upon motion of the defendant and after hearing Rothwell, Harper & Matthews, by Ben A. Matthews, Esq., of counsel, for the defendant, and Emory R. Buckner, Esq., by C. Frank Reavis, jr., Esq., Assistant United States Attorney, of counsel, in opposition thereto, it is hereby

Ordered that the sentence heretofore imposed herein be and the same hereby is vacated and set aside.

Dated New York, April 15, 1926.

COLIN NEBLETT,
United States District Judge.

14 In United States District Court

[Title omitted.]

Judgment

Filed Apr. 16, 1926

Upon the second count of the indictment herein and upon the defendant's plea of guilty thereto, and upon the motion in arrest of judgment filed herein,

Now, after hearing Rothwell, Harper & Matthews by Ben A. Matthews, Esq., of counsel, on behalf of the defendant, and Emory R. Buckner, Esq., by C. Frank Reavis, jr., Esq., Assistant United States Attorney, of counsel, in opposition thereto; it is hereby

Ordered that the judgment herein be arrested on the ground that the second count of the indictment does not state facts sufficient to constitute an offense against the United States, and that the indictment be and the same hereby is dismissed; and it is further

Ordered that the defendant herein be forthwith discharged from custody.

Dated New York, April 15th, 1926.

COLIN NEBLETT,
United States District Judge.

15 In United States District Court

[Title omitted.]

Assignments of error

Filed May 6, 1926

The United States of America, in connection with its petition for a writ of error, makes the following assignments of error, which they allege occurred in the decision of the court in sustaining a motion to arrest judgment given under the second count of the indictment herein, to wit:

(1) The court erred in sustaining the motion to arrest judgment under the second count of the indictment herein.

(2) The court erred in arresting judgment under the second count of the indictment herein.

(3) The court erred in holding as it did, in sustaining the motion to arrest judgment under the second count of the indictment herein, that section 253 of the revenue act of 1918, so far as indictments for perjury in tax returns under the revenue act of 1918 are concerned, repeals section 125 U. S. C. C.

(4) The court erred in holding as it did, in sustaining the motion to arrest judgment under the second count of the indictment herein, that section 125, U. S. C. C., is not applicable to the offense charged in the second count of the indictment herein.

The United States of America aforesaid, plaintiff-in-error, prays that the decision aforesaid and the order entered thereon for
16 the errors aforesaid in the record and proceedings herein may be reversed and altogether held for nothing, and that the plaintiff-in-error may be restored to all things which it has lost by reason of said decision, order, and judgment, and that the District Court of the United States for the Southern District of New York be directed to vacate and set aside said decision, order, and

judgment and for such other and further relief as to the court may seem proper.

Dated: New York, April 30th, 1926.

EMORY R. BUCKNER,
United States Attorney, Southern District of New York,
Attorney for Petitioner.

17 Copy received May 4, 1926.

ROTHWELL, HARPER & MATTHEWS,
Attorneys for Defendants.

18 In United States District Court

[Title omitted.]

Petition for writ of error

Filed May 6, 1926

Now comes the United States of America by its attorney Emory R. Buckner, United States attorney for the Southern District of New York, and complains that in a record and proceedings had in this cause and in the decision and order arresting judgment under the second count of the indictment herein a manifest error hath happened, as well appears in the assignments of error herewith submitted.

The United States of America prays for the allowance of a writ of error and for such other orders and purposes as may cause the same to be corrected by the Supreme Court of the United States.

Dated New York, N. Y., April 30th, 1926.

EMORY R. BUCKNER,
United States Attorney, Southern District of New York,
Attorney for Petitioner.

19 Copy received May 4, 1926.

ROTHWELL, HARPER & MATTHEWS,
Attorneys for defendant.

20 [Citation in usual form, showing service on Rothwell, Harper & Matthews, filed May 6, 1926. Omitted in printing.]

21 In United States District Court

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May 12, 1926.

EMORY R. BUCKNER,
Attorney for Plaintiff in Error.
BEN A. MATTHEWS,
Attorney for Defendant in Error.

22 [Clerk's certificate to foregoing transcript omitted in printing.]

23 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of record to be printed

Filed May 26, 1926

The plaintiff in error, in contending that the District Court erred in sustaining the motion to arrest judgment under the second count of the indictment herein, intends to rely upon the following:

(1) That the District Court erred in holding that section 253 of the revenue act of 1918, in so far as indictments for perjury in tax returns under the revenue act of 1918 are concerned, repealed section 125 of the United States Criminal Code.

(2) That the District Court erred in failing to hold that section 125 of the United States Criminal Code is applicable to the offense charged in the second count of the indictment herein.

Plaintiff in error believes that the entire record as filed will be necessary for the consideration of the errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

MAY 21, 1926.

Service of a copy of the foregoing statement of points is hereby acknowledged this 26 day of May, 1926.

ROTHWELL, HARPER & MATTHEWS.

[File endorsement omitted.]

[Indorsement on cover:] File No. 31961. S. New York, D. C. U. S. Term No. 395. The United States of America, plaintiff in error, vs. Solomon Noveck. Filed May 24th, 1926. File No. 31961.

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